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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

In The Matter Of

Omnibus Budget Reconciliation Act Of 1993)
Implementation Of Section 3(n) And)
Section 332(c) Of The Communications Act)
Regulatory Treatment Of Mobile Services)

94-110
GN Docket No. ~~93-252~~
PR File No. 94-SP8

OPPOSITION TO STATE PETITION FOR AUTHORITY TO MAINTAIN
CURRENT REGULATION OF RATES AND MARKET ENTRY

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SUMMARY

Union Telephone Company opposes the State of Wyoming's Petition For Authority To Maintain Current Regulation Of Rates And Market Entry ("Petition") because of its procedural and substantive deficiencies. The Petition was filed a day past the statutory deadline for states to petition to extend existing authority to regulate rates. The statutory deadline cannot be waived or extended. Nor does the statute permit the processing of the state's request to continue regulation of entry to Commercial Mobile Radio Services ("CMRS"). Congressional intent to preempt state regulation of CMRS is preserved only by the FCC's strict enforcement of procedural obligations placed on the states.

Wyoming has failed to meet the significant procedural requirement of carrying the burden of proof in justifying rate regulation, as codified in FCC Rule Section 22.13(a)(5). It has not demonstrated that market conditions with respect to CMRS services do not adequately protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Nor has it identified a substantial number of consumers who lack alternative means of communications. To the contrary, the landline operations of Union Telephone Company are efficiently supplemented by the company's offering of mobile and fixed cellular service. This offering does not deter expansion of more economical landline facilities, and it is offered at rates that are just, reasonable and non-discriminatory.

Union Telephone Company also opposes the Petition because it does not set forth the existing rate regulatory structure which is proposed to be preserved. The Petition attaches irrelevant documentation of state procedural rules generally applicable to all utilities. It also lists an odd array of unverified consumer complaints collected over the past six years. But the Petition does not allege anti-competitive or discriminatory practices or behavior by any carrier, nor does it specify any structure to regulate carriers' practices.

Because the State of Wyoming does not identify and describe in detail the existing rules it proposes to retain, as required by FCC Rule Section 22.13(a)(4), the FCC and interested parties are denied the opportunity to assess the state's proposal. The state offers a confusing and contradictory statement of what it does not require, and it refers to "regulated competition." However, it does not describe the nature and extent of any regulation, or particularize its contents. Likewise, the state requests authority to regulate until there is competition, but it does not demonstrate any lack of competition.

The rural character of the State of Wyoming demands the vigorous, free market radio industry envisioned by Congress. The FCC's consideration of the state's Petition will serve only to delay expansion and improvement of radio services to existing and prospective subscribers. The Petition should therefore be dismissed.

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OPPOSITION TO STATE PETITION FOR AUTHORITY TO
MAINTAIN CURRENT REGULATION OF RATES AND MARKET ENTRY

Union Telephone Company ("Union Telephone") is a landline local exchange carrier and a cellular licensee in Wyoming RSA 3, Colorado RSA 1 and Utah RSA 5. Union Telephone respectfully submits this Opposition to the State Petition For Authority To Maintain Current Regulation Of Rates And Market Entry ("Petition") filed with the Federal Communications Commission ("FCC") on August 10, 1994 by the Public Service Commission of Wyoming ("Wyoming PSC").

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act") ^{1/} prohibits states from regulating the entry into business or the rates of any commercial mobile radio services ("CMRS") or private mobile radio service. Under certain circumstances specified by statute, states which regulated CMRS rates as of June 1, 1993 were permitted to petition the

^{1/} See, Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b)(2), 107 Stat. 312, 392 (1993) amending Section 332(c)(3) of the Communications Act.

FCC to extend authority to regulate rates (not entry) of CMRS providers. In accordance with the procedures set forth in Section 22.13(a)(5), this Opposition addresses the Petition of the Wyoming PSC, the filing of which was published at 59 Fed.Reg. 42,595 (August 18, 1994).

I. The Wyoming PSC's Petition Is Procedurally Defective

Union Telephone opposes the Wyoming PSC's Petition as being procedurally prohibited, and beyond the scope of congressional intent in adopting the Budget Act, which was signed into law on August 10, 1993.

A. The Petition Was Filed Past the Statutory Deadline

States with rate regulation authority extant as of June 1, 1993 were permitted to extend that authority. The Budget Act specified that states petitions were to be filed prior to August 10, 1994. See, Communications Act, §332(c)(3)(B), 47 U.S.C. §332(c)(3)(B). The requirement is codified in Section 22.13(b) of FCC Rules, mandating the filing "before August 10, 1994." In its Second Report and Order, 9 FCC Rcd. 1411, 1501, note 492 (March 7, 1993) (emphasis added), hereinafter Second Report and Order, the FCC iterated the strictness of the statutory schedule stating, "States must file such petitions prior to August 10, 1994."

The statutory nature of the deadline precludes acceptance by the federal agency of the Wyoming PSC's Petition. This

rudimentary principle is consistently honored by the FCC. See, Metromedia, Inc., 56 FCC 2d 909, 35 RR 2d 1019 (1975), wherein the Commission concludes that a filing even one day late is untimely and must be dismissed. "Since the date for filing petitions for reconsideration is fixed by statute, petitioners' request to file must be denied." Id. See also, William Penn Broadcasting Co., 53 FCC 2d 1248 (1975). The Commission's precedential reasoning applies equally to the Wyoming PSC's petition. The Wyoming PSC did not timely file, and the Commission is powerless to waive the statutory deadline. The Wyoming PSC's Petition therefore cannot be considered.

B. The Wyoming PSC Fails to Demonstrate that Market Conditions Do Not Adequately Protect Subscribers

The conditions under which the FCC may grant a state's request to extend CMRS rate regulation are strict and well defined. The Wyoming PSC is required thereunder to demonstrate one of two environments:

- (1) Market conditions with respect to CMRS services do not adequately protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, or
- (2) Such market conditions exist and a substantial portion of subscribers in the area have no alternative means of obtaining basic telephone service.

See, FCC Rule Section 22.13(a)(1), and see, FCC Public Notice, DA 94-764, released July 8, 1994.

State petitions must demonstrate the environment by

providing such information as may be necessary to enable the FCC to determine market conditions prevalent in the state. If demonstrating the latter of the two environments, the state must provide information on the range of basic telephone service alternatives available to consumers in the state. Second Report and Order, at 96.

In its Petition, the Wyoming PSC appears to assert the existence of both alternative environments, but offers no evidence or specific market analysis supporting the contentions that either subscribers are subject to unjust, unreasonable or discriminatory rates, or that a substantial portion of CMRS subscribers have no alternative means of obtaining basic telephone service.

II. Rate Regulation of Fixed Cellular Service Is Not Justifiable

The Wyoming PSC describes a fixed cellular service, one type of which is offered by Union Telephone at a non-usage sensitive based flat rate. However, there is no allegation that the rates are unjust, unreasonable or discriminatory, or that they would be so without the Wyoming PSC. Nor does the Petition contain a demonstration of the number of fixed cellular subscribers in the state who have no alternative means of obtaining basic telephone service.

Nevertheless, the Wyoming PSC contends that it is entitled to regulate the fixed cellular service because:

- 1) rates for the service will forestall landline expansion if not properly reviewed and established by the Wyoming PSC;
- 2) the service can infringe in other companies' landline certificated areas, and could affect extension of facilities, service quality and rates; and
- 3) other landline companies have expressed concern over provision of the fixed cellular service as opposed to Basic Exchange Telephone Radio Service ("BETRS"). See, Petition, at 2.

In addition to being unproved, these factors do not constitute grounds for regulation under the preemptory scheme of the Budget Act. The Wyoming PSC fails to demonstrate that but for its regulation, there would exist an environment of unjust, unreasonable or discriminatory rates, for either fixed or mobile CMRS services.

Union Telephone has not forestalled landline expansion in deference to fixed cellular services or the rates charged therefore. Expansion has taken place in extremely remote and sparsely populated areas at substantial expense, all in response to subscriber demand, not state directives. Interference by the Wyoming PSC with expansion only slows Union Telephone's progress.

Union Telephone's subscribership to fixed cellular service in three states totals thirty-five subscribers to forty-three numbers, with the same rate structure in each state. In Wyoming, there are eleven fixed cellular subscribers, only four of whom are located outside Union Telephone's certificated area. They are Amoco, Riverton

Valley Electric Association, Williams Field Services and Production Operator, all of whom are sophisticated users of telecommunications services. These users typically request fixed cellular service at temporary work sites and oil rigs located in mountainous and desert terrain, miles from landline facilities. The installations are usually removed after three to six months of use. The users are not dissuaded from landline service where available, which costs considerably less than \$500 to install and \$48 per month for basic service.

This use of fixed cellular services is entirely appropriate for the radio service. It does not detract from landline extensions or investment. It does not threaten other certificated carriers, who themselves refer customers to Union Telephone for fixed cellular service. The rates charged for the service are not unreasonable, and provide no financial reward to Union Telephone. ^{2/}

The Wyoming PSC has demonstrated no infringement by fixed cellular service upon other companies' landline certificated areas, where landline service is still more economically attractive to the user. Nor has the Wyoming PSC demonstrated any effect by the service on extension of other carriers'

^{2/} Although Union Telephone believes that this service is beneficial to subscribers, the revenues from the eleven Wyoming subscribers will never warrant the time consuming and expensive certification process that Union Telephone underwent to obtain authority from the Wyoming PSC, nor the continuation of such regulation. The fact is, it is the regulation that makes the service financially unremunerative.

facilities or service quality. Further, the undefined "concerns" of other carriers do not justify regulation of rates. ^{3/}

The Wyoming PSC submits in Exhibit 3 of its Petition an illegible map purporting to illustrate that a substantial portion of subscribers in Wyoming RSA 3 have no alternative means of obtaining basic telephone service other than fixed cellular service from Union Telephone. While one could depict the overlap of cellular service areas with areas unserved by landline, there is no development by the Wyoming PSC of facts demonstrating a hostile rate environment in the overlap area, any lack of communications resources, or any facts supporting rate regulation under other criteria.

The Wyoming PSC has failed to meet the burden of providing evidence justifying rate regulation of CMRS services, as required by FCC Rule Section 22.13(a)(5).

^{3/} Ironically, the most caustic opposition to Union Telephone's initial offering of fixed cellular service came from the Wyoming PSC itself, resulting in a one year delay of the hearing process and order authorizing the service. The regulatory oversight of Union's application for fixed cellular service was onerous, time consuming, expensive and contrary to the public interest in that prospective customers were denied service with the immediacy they demanded. Union was required to present exhaustive cost studies and other documentation supporting the new service - even in light of anxious customer requests for the service. The final state authorization for the service contained many conditions and limitations to the service, including a need to request prior PSC approval for some connections and a need to report persons served and revenues collected.

**III. The Wyoming PSC's Gunshot Style Petition
 Does Not Fulfill the State's Burden of Proof**

In its Petition the Wyoming PSC details no existing structure for the establishment of fixed or mobile cellular rates. It only alludes to what is not required (cost justification for the rates proposed by CMRS providers), and to the flexibility (existing rates changed to meet market demand or competitive forces) of some otherwise undescribed scheme of regulation. The Wyoming PSC declares the existence of, but provides no clear presentation of, its requirements that rates be nondiscriminatory and that necessary customer service guidelines and procedures be in place.

By attachment of multitudinous exhibits, the Wyoming PSC seeks to have the FCC and others decipher its justification for CMRS rate regulation. It provides a cursory list of statements corresponding to the suggested evidence lists in Section 22.13(a)(2) of FCC Rules, but fails to tie the statements to its cause. For example, Exhibit 9 of the Petition is an exhaustive list of consumer complaints at the Wyoming PSC, dating back to 1988, against eleven listed carriers, concerning such matters as children who do not pay the monthly service charge for the cellular telephones given them as Christmas presents by their mother, and who should pay for the moving of a telephone line to accommodate a homeowner's new garage. See, Petition, Exhibit 10, complaints against Cellular One and US West Communications, respectively.

There is no connecting reasoning in the Petition as to the relevance of these complaints to the Wyoming PSC's regulation of fixed cellular or other CMRS service. Nor is there any verbalized connection of the complaints list to any alleged anti-competitive or discriminatory practices or behavior by Union Telephone or any other CMRS provider. Nor is the exhibit or any of its contents supported by the affidavit of any person with personal knowledge of any such practices or behavior.

In every instance, the Wyoming PSC fails to provide the type of factual support set forth in Section 22.13(a)(2). Nowhere are its ideas woven into an analysis justifying FCC sanction of the Wyoming PSC's regulation of any portion of CMRS rates, or any portion thereof.

**IV. The Wyoming PSC's Request for Authority
to Regulate Market Entry Is Not Sanctioned**

As part of its kitchen sink approach, the Wyoming PSC requests authority to regulate CMRS market entry. Entry regulation is not an activity that is permitted to be requested by states. Section 332(c)(3)(B) sanctions only rate regulation authority.

The Wyoming PSC explains that as of June 1, 1993 it exercised some market entry regulation of CMRS providers, stating that it reviews and approves the market entry of the wholesale cellular providers as licensed and authorized by the FCC." Petition, at 2. The Wyoming PSC then requests FCC

authority to "maintain this important and proper oversight" of intrastate services." Id. This request cannot be processed by the FCC. The Budget Act preempted entry regulation absolutely.

V. The Wyoming PSC Fails to Detail Existing Rate Regulations

Section 22.13(a)(4) of FCC requires that state Petitions "identify and describe in detail the rules the state proposes to establish if the petition is granted." In seeming response to this requirement, the Wyoming PSC attaches as Exhibit 12 a virtual volume of its Rules of Practice and Procedure, none of which recognizably deal with CMRS rates, generally or particularly. Union Telephone cannot ascertain with certainty which of all the rules and procedures are the rate regulations which are the subject of the Wyoming PSC's Petition. The Wyoming PSC's attempt to have all of its rules and procedures scrutinized by the FCC and parties to this proceeding is a waste of the FCC's limited resources, is a violation of Union Telephone's rights to procedural due process, and is wholly outside the scope and intent of Congress in devising an avenue for state rate regulation. The Petition should be dismissed as overbroad in its request, and for failure to comply with Section 22.13(a)(4) of FCC rules.

The state agency filing the petition must identify and describe in detail the specific existing rules the state proposes to retain if the petition is granted. States bear

the burden of proof. See, FCC Rule Section 22.13(a)(4) and (5). The Wyoming PSC has not met the burden, choosing instead to so vaguely allude to sundry portions of its amorphous regulatory structure that no other party can seriously judge the appropriateness of the state's regulation.

For example, The Wyoming PSC says that it has not required extensive cost support or onerous applications or studies for radio based carriers, with the minor exception of Union Telephone's radio service, wherein the landline studies identify the cellular operations. Petition, at 4. Put another way, the Wyoming PSC admits that it requires extensive cost support and onerous applications and studies for the radio based services of Union Telephone, because the studies of Union Telephone's regulated landline operations *identify* the cellular operations. The Wyoming PSC cannot possibly purport to justify rate regulation of Union Telephone's radio services because those services are *identifiable*. Neither does the Wyoming PSC feign with a modicum of specificity the structure for the regulation of Union Telephone's radio services. Justification for the regulation is blind man's guess.

The Wyoming PSC goes on the state, "The Commission has authorized regulated competition, thereby minimizing intrusion into the operations." Nowhere does it define "regulated competition" or describe the nature and extent of the intrusion that the Wyoming PSC must impose. Confusingly, in

its next paragraph, the Wyoming PSC appears to request authority to regulate only until there *is* competition, Petition, at 5, and the Wyoming PSC's earlier discussion of regulation of Union Telephone's radio services reveals that state intrusion into operations is in fact substantial.

The presentation of the exact parameters of the Wyoming PSC's request for authority to regulate is so deficient that it is not practically feasible for the FCC to consider the request. Entertainment of a less than fully pled state petition will seriously harm the procedural and economic interests of the carriers whom Congress has chosen to liberate from state regulation. The impending harm is incurred by existing and prospective users of the services, who will suffer from the delay of expansion and improvement of radio services while carriers' resources are diverted to agency and judicial proceedings.

VI. The Term of Proposed Regulation Is Insupportable

In those cases where the Commission authorizes the state to regulate rates for commercial mobile radio services, such regulations will be authorized only for the specified period of time the Commission finds to be necessary to ensure that rates will be neither unjust nor unreasonably discriminatory.^{4/} Such determinations are to be made on a case-by-case basis at

^{4/} Communications Act, 332(c)(3)(B), 47 U.S.C. 332(c)(3)(B).

the time regulatory authorization is extended to a petitioning state. To the extent that such rulings are made, they will remain in effect until such time as circumstances dictate. Second Report and Order, at 96.

The Wyoming PSC requests authority to regulate rates until such time as ubiquitous competition provides two or more alternatives for telecommunications within 70% of the area of Wyoming, but does not justify the proposal, explain its reasoning, or demonstrate a present and substantial absence of competition.

VII. The Wyoming PSC Must Be Prohibited From Continuing to Impose CMRS Rate Regulation Indirectly and Inconsistently

Despite its statements to the FCC, the Wyoming PSC's regulatory intrusion is typically pervasive and constant. In a recent application before the Wyoming PSC for a wireline telephone rate increase, Union Telephone's rates were investigated by the Wyoming PSC staff with the intent to credit the revenue and benefits from cellular service to landline telephone customers. The Wyoming PSC indeed reduced Union Telephone's landline telephone rates for local service partially on the strength of the company's cellular operations. Furthermore, Union was required to carefully report certain items, such as its cost allocation methodology for vehicle usage, in order to account for all cellular revenues. So, although the context of the Wyoming PSC's

investigations is with respect to a wireline telephone service, the effect is a pervasive regulation of Union's cellular service.

The Wyoming PSC's burdensome study and filing requirements indirectly result in regulation of Union Telephone's CMRS rates, and they compromise Union Telephone's competitiveness. The Wyoming PSC's intimation that it will regulate Union Telephone's CMRS rates in one manner, and those of another carrier differently or not at all, is patently unfair and unfounded.

Insidious and inconsistent rate regulation contravenes Congressional and FCC policy. The potential for abuse is recognized in the Second Report and Order, supra, at 1479-80, wherein the FCC refuses to accept voluntary filings because they can send pricing signals and thereby manipulate rates. Nevertheless, it is clear that the Wyoming PSC will utilize such practices to impose regulations illegitimately which it cannot impose legitimately. The Wyoming PSC will administer roundabout tactics to cure its failure to satisfy the FCC requirements of Section 22.13. Requiring informational filings and reports is deemed an unreasonable practice in interstate regulation, and it should also be recognized as an unreasonable method of intrastate regulation by the Wyoming PSC.

Conclusion

Union Telephone opposes the Wyoming PSC's Petition on the grounds that the Petition primarily represents an attempt by the Wyoming PSC to justify a concept with no verbalized connection to reality; there is no justification for the vague regulation it proposes to protect.

The Wyoming PSC maintains in its Petition that over the years, it "has developed an efficient and effective method of regulatory oversight for market entry, rates and services," and requests permission to continue "in order to ensure the just and reasonable provision of these services." As set forth herein, the Wyoming PSC's request is vacuous because its regulation of entry is wholly forbidden by statute, and because the precise regime of past and proposed rate regulation is not discernable within the four corners of the Petition. The FCC cannot grant a request that is presented in the abstract. Neither can it sanction state regulatory practices which circumvent preemptory legislation by subjecting CMRS carriers to filing requirements that are inconsistently applied and which have the effect of regulating rates without express FCC authority.

Union Telephone therefore respectfully requests that the Wyoming PSC's Petition be dismissed and denied.

Respectfully submitted,

UNION TELEPHONE COMPANY

By: Pamela L. Gist
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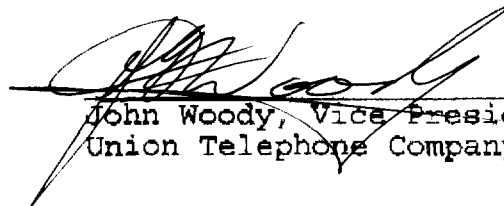
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Its Attorneys

September 19, 1994

DECLARATION

I, John Woody, Vice President of Union Telephone Company, hereby declare under penalty of perjury that I have read the foregoing OPPOSITION TO STATE PETITION FOR AUTHORITY TO MAINTAIN CURRENT REGULATION OF RATES AND MARKET ENTRY (SECTION 20.12) and that the facts contained therein are true and accurate to the best of my information, knowledge and belief, except that I do not and need not attest to those facts which are subject to official notice by the Commission.



John Woody, Vice President
Union Telephone Company

Date: September 16, 1994


CERTIFICATE OF SERVICE

I, Mike Hunter, an employee of the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 19th day of September, 1994, sent by first class United States mail, copies of the foregoing OPPOSITION TO STATE PETITION FOR AUTHORITY TO MAINTAIN CURRENT REGULATION OF RATES AND MARKET ENTRY to the following:

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